LIBRARY
REME COURT, U. S.

FILED
FEB 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

1085

MORRIS ZUDICK, as President of Morris Zudick Construction Company and as President of Walnut Grove Realty Company,

Petitioner,

vs.

UNITED STATES OF AMERICA and Alexander Dombroski, Special Agent, Internal Revenue Service,

Respondent.

ANTHONY DE GROSA, as President of De Grosa Trucking, Inc.,

Petitioner,

vs.

UNITED STATES OF AMERICA and Edward Ader, Special Agent, Internal Revenue Service,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERBERT L. ZUCKERMAN,
Counsel for Petitioners,
60 Park Place,
Newark, New Jersey, 07102.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AMENDMENTS INVOLVED	2
STATUTE INVOLVED	3
OTHER MATERIAL INVOLVED	4
STATEMENT	4
ARGUMENT:	
Point 1—A Special Agent of the Internal Revenue Service is a federal police officer	6
Point 2—A federal police officer is required to establish probable cause and secure a search warrant prior to his examination of an accused's property (assuming adequate time is available, and no threat of absconding present)	8
CONCLUSION	11
APPENDIX:	
A—Opinion of United States Court of Appeals Re: USA, et al. v. Anthony DeGrosa	1a
B—Opinion of United States Court of Appeals Re: USA, et al. v. Morris Zudick	6a
C—Judgment of United States Court of Appeals Re: USA, et al. v. Anthony DeGrosa	9a
D—Judgment of United States Court of Appeals Re: USA, et al. v. Morris Zudick	10a

PAGE

Cases Cited

Henzel v. U. S., 296 F. 2d 650 (5 Cir. 1961)..... 9, 10

Magnus, Mabee & Reynard, Inc., In re, 311 F. 2d 12 (2 Cir. 1962), cert. den., 373 U. S. 902 (1963)..... 10

Mathis v. United States, —— U. S. ——, 20 L. Ed. 2d 381 (1968)..... 6, 7

Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946)..... 9

Schwimmer v. U. S., 323 F. 2d 855 (8 Cir. 1956), cert. den., 352 U. S. 833 (1956)..... 9

Sibron v. State of New York, —— U. S. ——, 20 L. Ed. 2d 917 (1968)..... 11

Silverthorn Lumber Co. v. United States, 251 U. S. 382 (1920)..... 8

United States v. Wallace, and Tiernan Co., 336 U. S. 793 (1949)..... 9

United States Constitution Cited

Fourth Amendment 2, 5, 9, 11

Fifth Amendment 9

Statutes Cited

26 U.S.C.:

Sec. 7402(b) 5

Sec. 7602 ..... 2-4, 10

Sec. 7604(a) 5

28 U.S.C.:

Sec. 1254(1) 2

PAGE

Rule Cited

Rule 23(5) 2

Other Authority Cited

Statement of Organization and Functions, Federal Register, January 21, 1967 (32 F. R. 727)..... 4
Sec. 1118.4 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

MORRIS ZUDICK, as President of Morris Zudick Construction Company and as President of Walnut Grove Realty Company,

Petitioner,

vs.

UNITED STATES OF AMERICA and Alexander Dombroski, Special Agent, Internal Revenue Service,

Respondent.

ANTHONY DE GROSA, as President of De Grosa Trucking, Inc.,

Petitioner,

vs.

UNITED STATES OF AMERICA and Edward Ader, Special Agent, Internal Revenue Service,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Morris Zudick and Anthony De Grosa, pray that Writs of *Certiorari* issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on January 6, 1969.

Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit were filed on January 6, 1969. They are reprinted in full at pages 1a-8a *infra*.

Jurisdiction

These cases involve suits by the United States to enforce Internal Revenue Summonses issued by Special Agents of the Internal Revenue Service allegedly pursuant to Title 26 U.S.C. §7602. The judgments of the Court of Appeals were filed on January 6, 1969. Jurisdiction is conferred on this Court by Title 28 U.S.C. §1254(1).

Question Presented

The two cases decided by the United States Court of Appeals for the Third Circuit were both argued on the same date by the same counsel; and the decisions of the Court of Appeals were filed on the same date. The cases involve an identical question. Pursuant to U. S. Sup. Ct. Rule 23(5), 28 U.S.C.A., the two matters are combined in a single Petition. The question involved is: Whether the conceded privilege against unlawful search and seizure is realistically afforded a corporation when a Federal police officer is permitted to require the production of its property to further a criminal case without the prior showing of probable cause and the securing of a search warrant?

Constitutional Amendments Involved

Amendment IV—Searches and Seizures.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon a

probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Statute Involved

Section 7602 Internal Revenue Code—Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act or any officer or employee of such person or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony under oath as may be relevant or material to such inquiry.

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

Other Material Involved

Statement of Organization and Functions, Federal Register, January 21, 1967 (32 F. R. 727):

> 1118.6 Intelligence Division. The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance program and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases.

Statement

The facts in these cases are essentially undisputed. In both situations, corporate officers were served by special agents of the Intelligence Division of the Internal Revenue Service with an Administrative Summons, pursuant to Section 7602 of Title 26 of the United States Code (pp. 15a in the Zudick appendix and pp. 26a-27a in the De Grosa appendix). Their respective corporations (the "taxpayers") were under investigation. In

both situations the corporate officers appeared at the requested place and time with the records demanded. In both situations an effort was made to determine whether the examination was civil or criminal in nature. In the *Zudick* case, the Special Agent flatly stated that he would not accept payment of civil tax deficiencies (p. 3a *Zudick* appendix). In light of the inability of the taxpayers to elicit any such representation, and with the forehand knowledge of the functions of a Special Agent (as set forth in the Code of Federal Regulations, *supra*), the corporate officers respectfully declined to relinquish the records involved.

Civil actions were commenced in the United States District Court of the District of New Jersey to enforce the Internal Revenue Service summons. Jurisdiction was stated by the government to be Sections 7402 (b) and 7604(a) of the Internal Revenue Code of 1954. At the hearing the corporate officers, through counsel, urged the Court not to enforce these Summonses on the basis that they were being used for a purpose not contemplated by Congress and in violation of the Fourth Amendment Rights indisputably available to corporations. After argument the District Court granted the petitions for enforcement without the filing of a written opinion.

Subsequent to the entry of the District Court's Order the acting Assistant Regional Counsel of the Mid-Atlantice Region, Internal Revenue Service, sent a letter dated August 23, 1968 to the counsel for De Grosa Trucking, Inc. advising him that criminal prosecution for tax evasion had been recommended against the officer of the corporation. Such a letter was filed as a supplement to the De Grosa record in the appeal taken to the United States Court of Appeals for the Third Circuit, (see Order entered November 4, 1968).

By opinions filed on January 6, 1969, the United States Court of Appeals for the Third Circuit affirmed the orders of the District Court. A timely application for a stay was made by both corporations pending their petition for *certiorari*. The government filed an Opposition to the Motions for Stay of Mandate and offered as a basis for its opposition the fact that the statute of limitations on criminal offenses would shortly expire. This opposition was noted by the government as applicable to both Zudick and De Grosa. On February 13, 1969 the United States Court of Appeals for the Third Circuit extended its stay of mandate pursuant to the application of the two petitioner-corporations.

ARGUMENT

POINT 1

A Special Agent of the Internal Revenue Service is a federal police officer.

The structure of the Internal Revenue Service is a complicated one, but citizens are afforded some relief in the form of the Statement of Organization and Functions published in the Federal Register on January 21, 1967. This statement (p. 4 *supra*) clearly relates the duties of the Intelligence Division of the Internal Revenue Service. Special Agents Ader and Dombroski both are employed by the Intelligence Division. Their duties are clearly of a criminal nature. There is no language whatsoever in this provision which sets forth a tax collection or civil duty. This should be compared with another section of the same Statement of Organization and Functions which describes the duties of the Audit Division (Section 1118.4). This distinction has recently been noted by a dissenting opinion in the case of *Mathis* v.

United States, ——U. S. ——, 20 L. Ed. 2d 381, 386 (1968). In that case, Mr. Justice White observed that the Intelligence Division worked "regularly on criminal matters" *Id.,* fn. 2.

The Court below seemed to make much of the fact that there was a conceivable civil purpose to these investigations. By the same token, one is hard pressed to conceive of *any* police investigation which would not have some civil aftermaths to it. This would be particularly true in the area of Federal criminal investigations with their emphasis on financial transactions (as contrasted with the more violent of the common law felonies).

It is strongly urged that the Third Circuit misconceived the nature of police work when it eliminated from this category any investigation which could have a civil aspect. Almost all police work does.

We must assume, therefore, as did the Third Circuit, that the investigation here is "principally" criminal. The facts of these cases lend peculiar support to this contention. Initially, in the Zudick case, the Special Agent declined to accept a payment of the corporate tax liability.[1] Nothing could more forcefully have undermined the taxpayers' contention than a willingness to accept payment for any tax liabilities. A refusal by an examining agent to even discuss the tax liability is clear evidence of the purpose of the investigation. However, we have more facts in these cases which dispel any notions of a "routine" tax investigation. The record below indicates that De Grosa is the subject of a criminal investigation by the Internal Revenue Service (the letter of August 23, 1968 from the Assistant Regional Coun-

[1] At the oral argument before the Court of Appeals, Judge Hastie dismissed this with the observation that this was not the special agent's job. This, of course, is the very point.

sel). The record further yields the embarrassingly candid statement by the government that it was concerned about a stay of mandate being granted by the Third Circuit because the statute of limitations on criminal prosecutions was about to expire. Can there be any question but that the summonses involved are the tools of a police investigation? Can there be any question about the essentially police duties of these special agents?

POINT 2

A federal police officer is required to establish probable cause and secure a search warrant prior to his examination of an accused's property (assuming adequate time is available, and no threat of absconding present).

There is, of course, an abundance of cases which continues to deny coroprations the right to withhold their records in a Federal tax investigation conducted by a Special Agent. It is noted that these cases rely upon the fact that a special agent is nothing more than an administrative agent doing his duty and that his function is at least partially civil in nature. If we accept this reasoning as a true analysis of the special agent *per se,* the aggravated circumstances of the cases *sub judice* would seem to remove them from the general rule. The danger here is that on iron-clad invariable position will work an injustice.

Beginning with the leading case of *Silverthorn Lumber Co.* v. *United States,* 251 U. S. 382 (1920), no doubt exists but that the Fourth Amendment right of protection against unreasonable search and seizure shall be afforded a corporation. This case states no difference between an individual's rights under such amendment and a corpora-

tion's. (There is no attempt here at urging that a corporation has the privilege against self-incrimination afforded by the Fifth Amendment. This principle has too long been established to now attempt a diputation.) Furthermore, the compelled production of books and records by a subpoena *duces tecum* is as much within the guaranty of the Fourth Amendment as is the reaching of them by means of a warrant. *Schwimmer* v. *U. S.*, 232 F. 2d 855 (8 Cir. 1956), *cert. den.* 352 U. S. 833 (1956).

Moreover, the vitality and purpose of the Fourth Amendment, as it applies to corporations, should not be diluted with irrelevant considerations of these differences which do exist with respect to the privilege against self-incrimination. Corporate records are protected against unreasonable search and seizure. *Henzel* v. *U. S.*, 296 F. 2d 650 (5 Cir. 1961). The protection has a very practical meaning. The prohibition of unreasonable searches and seizures contained in the Fourth Amendment rests upon the desirability of having a magistrate rather than a police officer determine when searches and seizures are permissible and what limitations should be placed upon such activities. *United States* v. *Wallace, and Tiernan Co.*, 336 U. S. 793 (1949).

The principal case relied upon by the Third Circuit is not similar enough in fact to undermine the position of the petitioners. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), the Court was undoubtedly influenced by the fact that the petitioner was seeking an "absolute or universal immunity" from an examination of its records. *Id.* 208. The herein corporations do not maintain this position at all. They recognize that their records can be examined; but they insist that elemental procedural safeguards, such as a prior showing of probable cause, are necessary before such an examination may take place. The *Oklahoma Press* case states that it is

enough if the investigation is for a lawfully authorized purpose within the power of Congress to command, *Id.* 209. With such reasoning, it has little difficulty in enforcing an Administrative Subpoena. The cases before us differ in several regards. Initially, a strong showing has been made here of the principal criminal thrust of this investigation. Secondly, it is not at all clear, assuming the power of Congress to so order, that Congress has, in fact, so ordered.

It has been maintained since the inception of this case that Section 7602 of the Internal Revenue Code of 1954 is an investigative implement in a tax examination and should have no part in this type of investigation which is so demonstrably not for the purpose of collecting tax. Congress, through the plain language of the statute, has so ordered.

A further difficulty which the lower court seemed to have was in the identification of the proper parties claiming Constitutional deprivation. It should be noted that these cases originated in suits brought by the government to enforce the summons. They were not actions originally brought by the taxpayers to quash the summons. Consequently, the style of entitlement is that of the government's. They designated the defendants to be Morris Zudick as an officer and Anthony De Grosa as an officer. It is in this form that the parties have appeared at all levels. These are corporations, not individuals, seeking relief. They are acting through their officers, the very ones summonsed by the government. This is not a case of a Third Party, *i.e,* a stockholder, attempting to challenge the summons directed toward someone else's records. Compare *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12 (2 Cir. 1962) *cert. den.* 373 U. S. 902 (1963). There can be no disputing the standing of the present petitioners to challenge the warrantless search of their own records. *Henzel* v. *U. S., supra.*

The concerns voiced by the herein petitioners are directed to the seemingly sterile application of the Fourth Amendment to corporations' rights. In this case, a search is to be made of corporate records in an obviously criminal proceeding without the prior necessity of establishing probable cause. The facts in these cases are aggravated enough to remove them from the line of cases which seem to dilute the vigor of the Fourth Amendment as applied to corporations. The Constitutional validity of a warrantless search can only be decided in the concrete factual context of the individual case. *Sibron* v. *State of New York,* —— U. S. ——, 20 L. Ed. 2d 917 (1968).

The use of this Administrative Summons is consequential in the administration of the Internal Revenue laws. The challenges to this use have become numerous. While such spontaneous resistance to an Administrative act does not, in itself, denote extra legal activity, no hard and fast rule should be laid down with respect to the unfettered ability of a federal policeman to secure corporate records in a patently criminal investigation.

CONCLUSION

For the reasons urged herein, it is requested that the Supreme Court of the United States grant a writ of certiorari to review these judgments of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

HERBERT L. ZUCKERMAN
Attorney for Petitioners
60 Park Place
Newark, N. J. 07102

[APPENDICES FOLLOW]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17308

UNITED STATES OF AMERICA AND EDWARD ADER, SPECIAL AGENT, INTERNAL REVENUE SERVICE

v.

ANTHONY DEGROSA, AS PRESIDENT OF DEGROSA TRUCKING, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 22, 1968

Before HASTIE, *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 6, 1969)

SEITZ, *Circuit Judge.*

This is an appeal from an order made pursuant to 26 U. S. C. A. § 7604, enforcing an internal revenue summons issued by Internal Revenue Service Special Agent Edward Ader on August 8, 1967, pursuant to 26 U. S. C. A. § 7602. The summons directed Anthony DeGrosa, as President of DeGrosa Trucking, Inc., to produce certain specified records of DeGrosa Trucking, Inc., whose tax liability was under

investigation. Appellant, DeGrosa, appeared before Special Agent Ader with the materials demanded in the summons; however, the appellant refused to surrender the materials claiming that the summons was being used for an unauthorized purpose. An action for enforcement was brought in the district court against DeGrosa only, at which time appellant urged that enforcement of the summons would violate his constitutional rights and those of the corporation and that enforcement would permit an unauthorized use of the summons. After argument the court granted the petition for enforcement without filing a written opinion. DeGrosa ("appellant") now appeals.

Appellant contends (1) that the use of the § 7602 summons to obtain evidence for possible use in a criminal proceeding is an improper, or ultra vires, use of the summons, (2) that compelling production of the records sought would violate his Fourth Amendment rights and those of the corporation,[1] and (3) that permitting Agent Ader to conduct a criminal investigation using the § 7602 summons deprives the appellant of his Fifth Amendment right to have the Grand Jury conduct the investigation.

In Support of his first contention appellant, citing Reisman v. Caplin, 375 U. S. 440, 449 (1964), argues that the investigation by Special Agent Ader is "principally" a criminal investigation and that it is improper to employ the § 7602 summons for the purpose of obtaining evidence for use in a criminal prosecution. Appellant does not contend—as, indeed, he could not on the record here[2]—that the investigation lacked a civil purpose.

Appellant's reliance on Reisman, supra, is misplaced. This is made clear when the language of the Supreme Court,

---

1 Appellant does not make it entirely clear that he is asserting an infringement of the corporation's Fourth Amendment rights as well as of his own. However, to avoid fragmentation of this litigation, we construe appellant's argument as directed to the protection of both his and the corporation's rights.

2 A reading of the transcript of the oral argument before the district court, the petition for enforcement, the affidavit of Agent Ader, and the language of the summons discloses that Agent Ader's investigation had the dual purpose of determining the civil liability of DeGrosa Trucking, Inc., if any, as well as any criminal responsibility.

upon which appellant relies,[3] is considered in connection with the court's citation to Boren v. Tucker, 239 F.2d 767 (9th Cir., 1956), which follows immediately after the critical language. In Boren, supra, the Ninth Circuit held that a § 7602 summons may properly be issued in aid of internal revenue investigations which have a civil purpose, notwithstanding the fact that the information might also be used in a criminal prosecution.[4] See also Wild v. United States, 362 F.2d 206 (9th Cir., 1966); In Re Magnus, et al., 311 F.2d 12 (2nd Cir., 1962), cert. den. 373 U. S. 902 (1963). Assuming, as the appellant urges, that the investigation by Agent Ader is "principally" criminal, the authority cited by the appellant does not support the conclusion that this summons is being used for an improper purpose, inasmuch as his contention does not negative the existence of a proper civil purpose.[5]

We turn next to appellant's Fourth Amendment contention. Although the materials sought are corporate records we assume that the appellant has standing to assert the claim on his own behalf[6] and on behalf of the corporation.[7]

---

3 "Furthermore, we hold that in any of these proceedings before either the district judge or the United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 239 F.2d 767, 772-773 * * *."

4 At oral argument, counsel stipulated into the record a letter from the Regional Counsel, Internal Revenue Service, to appellant's counsel, which letter recites that criminal proceedings have been recommended against the appellant. By letter submitted after oral argument, the Department of Justice called the court's attention to the fact that the recommendation for prosecution had not been passed on by the Regional Counsel and that the case had not yet been forwarded to the Department for actual prosecution. The fact that a criminal prosecution is on the horizon does not transform the investigation into one "solely criminal." Therefore, whether tested at the time issued or at this date, which would encompass the recommendation for prosecution, the use of the summons here is not improper. Compare In Re Magnus, et al., 311 F.2d 12, 16 (2nd Cir., 1962).

5 If Wright v. Detwiler, 241 F. Supp. 753 (W. D. Pa., 1964), aff'd. per curiam, 345 F.2d 1012 (3rd Cir., 1965) is read as permitting the use of a § 7602 summons in aid of an investigation solely criminal, its continuing vitality is in question. However, the present facts do not require us to reach that issue.

6 Compare Mancusi v. DeForte, 392 U. S. 364 (1968).

7 Cf. Silverthorn Lumber Co. v. United States, 251 U. S. 385 (1920).

Appendix A

Appellant's contention that the use of a § 7602 summons constitutes an unreasonable search and seizure, where, as here, the investigation has both civil and criminal aspects, has often been advanced as a ground for requesting that enforcement of the summons be denied. In fact, within the past year, the Supreme Court had occasion to consider such an attack on § 7602 and § 7604. Justice v. United States, 390 U. S. 199 (1968), aff'g., U. S. v. First National Bank of Pikeville, et al., 274 F. Supp. 283 (E. D. Ky., 1967). The court, in a per curiam opinion, affirmed a three judge district court which, inter alia, upheld the constitutionality of the § 7602 summons procedure against a Fourth Amendment challenge by the intervening taxpayers.

It has long been established that an administrative summons authorized by Congress in aid of an agency's investigative function need not be supported by ad hoc showings of probable cause. Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 216-217 (1946). The Constitution only requires that the summons not be employed in excess of the statutory purpose, that it be specific in directive so that compliance will not be unreasonably burdensome and that an ample opportunity be afforded to obtain judicial review of the demand prior to suffering penalties for a refusal to comply. Oklahoma Press Publishing Co. v. Walling, supra; See v. City of Seattle, 387 U. S. 541, 544-545 (1967).[8]

In the instant case, there is no question but that the summons will not unreasonably burden the appellant. In point of fact, the appellant was able to gather the materials requested and bring them before Agent Ader at the time and

---

8 The court concluded its discussion of the limitations on administrative summons in See, supra, by noting:

"The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation."

We do not read this language as imposing a probable cause requirement on the issuance of a § 7602 summons; but instead, as a statement of the considerations which govern a determination of the reasonableness of the statutory scheme in the context of the Fourth Amendment. The constitutionality of the statutory scheme here was most recently reviewed, and approved, in Justice v. United States, supra.

place directed in the summons. Further, enforcement of the summons is not left to the discretion of the agent issuing it, but is delegated to the district court where the reasonableness of the demand may be reviewed. Finally, as decided above, the summons here is not being used for a purpose in excess of that authorized by Congress.

Accordingly, appellant's second contention that the summons issued by Agent Ader suffers a fatal constitutional infirmity is without merit.

Lastly, appellant contends that Agent Ader's use of the § 7602 summons is an impermissible intrusion on his Fifth Amendment right to have the Grand Jury conduct the investigation. A reading of the Fifth Amendment in itself disposes of this contention. The right conferred in the Fifth Amendment is that no person can be held to answer for an "infamous crime" except upon an indictment returned by the Grand Jury. Clearly, the procedure contemplated in 26 U. S. C. A. §§ 7602, 7604 does not at all impinge on this right of the appellant.

The order of the District Court enforcing the summons is affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17238

UNITED STATES OF AMERICA AND ALEXANDER DOMBROWSKI, SPECIAL AGENT, INTERNAL REVENUE SERVICE

v.

MORRIS ZUDICK, AS PRESIDENT OF MORRIS ZUDICK CONSTRUCTION COMPANY AND AS PRESIDENT OF WALNUT GROVE REALTY COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF NEW JERSEY

Argued October 22, 1968

Before HASTIE, *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges*.

OPINION OF THE COURT

(Filed January 6, 1969)

PER CURIAM.

This appeal is from an order of the district court enforcing, pursuant to 26 U. S. C. A. § 7604, internal revenue summonses issued pursuant to 26 U. S. C. A. § 7602 by a special agent of the Internal Revenue Service. One sum-

Appendix B

mons, served in connection with the investigation of the tax liability of Morris Zudick Construction Co., directed Morris Zudick, as President of Morris Zudick Construction Co., to produce certain specified books and records of the company. The other summons, served in connection with the investigation of the tax liability of Morris Zudick individually, directed Morris Zudick, as President of Walnut Grove Realty Co., to produce certain specified books and records of Walnut Grove. Appellant, Zudick, appeared before Special Agent Dombrowski as directed in the summonses with the materials demanded; however, he refused to surrender the materials claiming that the summonses were being used for an unauthorized purpose. An action for enforcement was brought in the district court against Zudick only. In urging that the petition for enforcement be denied, Zudick contended that enforcement of the summonses would violate his constitutional rights and those of the respective corporations and that enforcement would permit unauthorized use of the summonses. After argument, the district court granted the petition for enforcement without filing a written opinion. Zudick ("appellant") now appeals.

The factual setting here, with the exception of one minor variation, and the contentions advanced by the appellant and the issues arising therefrom, are identical to those presented to this court and decided in favor of the Internal Revenue Service in United States v. DeGrosa, No. 17308 (filed January 6, 1969). The factual variation is that here the tax liability of Morris Zudick individually is being investigated as well as that of one of the corporations whose records are sought. Inasmuch as appellant DeGrosa was permitted to raise each of the grounds for denying enforcement that appellant Zudick now urges, we perceive no legal significance in the fact that Agent Dombrowski's investigation includes an investigation of Morris Zudick's personal tax liability.[1]

1 We note further that in DeGrosa, supra, although the investigation by Agent Ader was directed to the liability of the corporation only, criminal prosecution was recommended to the Regional counsel against DeGrosa individually. Thus, even the factual variation noted in the text is substantially removed.

Appendix B

Accordingly, we affirm the order of the district court enforcing the summonses for the reasons set forth in our opinion in United States v. DeGrosa, supra.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,308

UNITED STATES OF AMERICA and EDWARD ADER,
Special Agent, Internal Revenue Service

vs.

ANTHONY DEGROSA, as President of Degrosa Trucking, Inc.,

Appellant

(D. C. Civil No. 176-68)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge,* and SEITZ and ALDISERT, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed April 4, 1968, enforcing the summons be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

January 6, 1969

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,238

UNITED STATES OF AMERICA and ALEXANDER DOMBROWSKI, Special Agent, Internal Revenue Service

vs.

MORRIS ZUDICK, as President of Morris Zudick Construction Company and as President of Walnut Grove Realty Company,

Appellant

(D. C. Civil Action No. 1228-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge*, and SEITZ and ALDISERT, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 6, 1968, enforcing the summonses be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

January 6, 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1085

MORRIS ZUDICK and ANTHONY DE GROSA, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. 1a-8a) are not officially reported.

JURISDICTION

The judgments of the court of appeals were entered on January 6, 1969. (Pet. 9a-10a.) The petition for a writ of certiorari was filed on February 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment prohibits enforcement of a summons issued by a special agent of the Internal Revenue Service requiring an officer of a corporation to produce corporate records for determination of the tax liabilities of the corporation and the officer.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the

summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[26 U.S.C. 7602.]

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * *

[26 U.S.C. 7604.]

STATEMENT

The petition seeks review of decisions in two unrelated but similar actions brought by the United States to enforce Internal Revenue summonses issued by special agents. The summonses directed petitioners, as officers of their respective corporations, to produce specified corporate records relating to the tax liabilities of the corporations and, in the case of petitioner Zudick, to his individual income tax liabilities. The government's petition for enforcement in each case was supported by an affidavit of the special agent

alleging that it was necessary to inspect the corporate records in order to ascertain the tax liabilities under investigation. (Z. App. 11a-18a; DeG. App. 20a-27a.)[1] In each case, petitioner appeared before the special agent but refused to produce the corporate records unless the government committed itself to use the records solely for civil tax purposes. (Z. App. 6a-7a; DeG. App. 11a.) After a hearing in each action, the district court issued orders requiring petitioners to produce the corporate records called for. (Z. App. 18a; DeG. App. 28a.) The order of enforcement in each case was affirmed by the court of appeals. (Pet. 9a-10a.)

ARGUMENT

In *Justice* v. *United States*, 390 U.S. 199, this Court affirmed summarily the judgment of a three judge court which had held that the statutory procedure for issuing and enforcing an Internal Revenue summons did not contravene the Fourth and Fifth Amendments even though information might thereby be obtained for subsequent use in a criminal proceeding (*United States* v. *First National Bank of Pikeville*, 274 F. Supp. 283 (E.D. Ky.). And in *United States* v. *Powell*, 379 U.S. 48, 52-57, this Court held a showing of probable cause in the technical sense unnecessary for judicial enforcement of a summons to investigate suspected tax fraud. Thus, there is no merit to petitioners'

[1] Record references herein are to the appendices filed in the court of appeals. "DeG. App." and "Z. App." are references to the appendices filed in the court of appeals by petitioners DeGrosa and Zudick, respectively.

argument that the statutory procedure may not be used where, as in these cases, the investigation of tax liability may result not only in determination of civil liabilities, but in an administrative recommendation that the corporate officer be prosecuted for criminal offenses relating to the tax liabilities.[2]

The fact that petitioner DeGrosa "is the subject of a criminal investigation by the Internal Revenue Service" (Pet. 7) adds nothing to his position. As the court of appeals noted (Pet. 2a-3a, fn. 4) even though "criminal prosecution is on the horizon * * *", it is not possible to contend that the investigation lacks a civil purpose. Furthermore, a corporate officer has no privilege to refuse to produce corporate records which may implicate him in criminal offenses. *United States* v. *White*, 322 U.S. 694, 699.

---

[2] Petitioners urge that under Section 1118.6 (Pet 4) of the Statement of Organization and Functions, 32 Fed. Reg. 727, 760, the special agent's function is purely criminal. But Section 1114.(10) of the Statement, 32 Fed. Reg. 727, 754, makes it clear that the special agent's duties are not so narrowly constricted. The functions of the Intelligence Division are stated to include "the investigation of alleged tax fraud, certain other civil and alleged criminal violations of tax laws * * * and such other special investigations as the Commissioner may direct."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

MARCH, 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 337791 580